IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-132

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS, *Petitioner*

v.

CLARK-SCHWEBEL FIBERGLASS CORPORATION and BURLINGTON INDUSTRIES, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT BURLINGTON INDUSTRIES, INC. IN OPPOSITION

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OPINIONS BELOW

The unanimous opinion of the Court of Appeals for the Second Circuit (Appendix A to the Petition) is reported at 504 F.2d 1036 (2d Cir. 1976). The "Memorandum Order" of the District Court denying post-trial motions for a directed verdict, judgment n.o.v. or in the alternative a new trial (Appendix B to the Petition) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1976. A petition for rehearing was denied by the Court of Appeals on May 12, 1976 (Pet. App. A[1]). The petition for a writ of certiorari was filed on July 29, 1976. On August 16, 1976, respondent Burlington Industries, Inc., was granted an extension of time to and including September 10, 1976, within which to file its brief in opposition to the petition. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly concluded that in this antitrust conspiracy case the circumstantial evidence relied upon by petitioner was insufficient to support the verdict and that the undisputed facts were antithetical to the existence of a conspiracy.

2. Whether this Court should adopt a rule in this case that whenever a jury verdict is concurred in by the trial judge on post-trial motions a reviewing court may not set aside the verdict as being unsupported by the evidence.

STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. 1) and Section 4 of the Clayton Act (15 U.S.C. 15), as well as Constitutional provisions and rules relied upon by petitioner, are set out in the petition at pp. 3-4.

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[1] "Pet. App." as used herein refers to the appendices to the petition. The transcript of testimony and other trial proceedings is cited as "Tr." and plaintiff's and defendants' trial exhibits are cited, respectively, as "PX" and "DX."

STATEMENT OF THE CASE

This is a private treble damage antitrust action under § 4 of the Clayton Act (15 U.S.C. § 15) alleging that defendants Clark-Schwebel Fiberglass Corporation (Clark-Schwebel), J. P. Stevens and Co., Inc. (Stevens) and Burlington Industries, Inc. (Burlington)—manufacturers of fiberglass decorative fabrics—violated Section 1 of the Sherman Act (15 U.S.C. § 1) by conspiring to drive a former customer, Textura Ltd., out of the business of converting fiberglass fabrics into curtains and draperies for installation in office and apartment buildings.[2]

It was alleged that this conspiracy was effectuated and evidenced by consciously parallel restrictions of Textura's credit by respondents, withholding or delaying deliveries of needed fabrics, deliberate shipment of inferior merchandise, coercion of Textura to settle an arbitration proceeding between it and Clark-Schwebel arising from petitioner's unilateral deduction of $30,000 as a credit against accounts it owed to Clark-Schwebel, and inducement of Textura's factoring firm to terminate an agreement pursuant to which Textura sold certain of its accounts receivable and without which Textura could not operate (Pet. 17).

Petitioner also claimed that defendants had a motive to drive Textura out of business. It was contended that Burlington (and Stevens) had received complaints over a long period from Textura's "competi-

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[2] Textura, successor to a company known as "Glass Fabrics, Inc.," appears here, as it did below, through its trustee in bankruptcy. For convenience, these parties are referred to herein as "Textura" or "petitioner."

tors" about Textura's selling methods,[3] that Clark-Schwebel was concerned about Powrie's complaints over fabric quality and his general "querulousness," and that as a result of these matters respondents conspired to drive Textura out of business.[4]

Defendants denied all of these allegations, asserting that the business transactions relied upon as circumstantial evidence of conspiracy were neither similar nor parallel but were reasonable actions consistent with the independent business self-interest of suppliers trying to get paid for merchandise sold to a cash-poor customer.[5]

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[3] Much of the present petition is devoted to a recitation of the development by Textura's principal, Malcolm G. Powrie, of the new market for fiberglass drapes represented by large apartment and office buildings which, before the advent of Textura, had used venetian blinds. This led the Court of Appeals to question "how significant the competition between these [complaining] firms and Textura was" (Pet. App. A, 3358-3359, n.17).

[4] The petition incorrectly states that Textura's competitors complained "*to all three defendants* about Powrie's 'direct selling'" (Pet. 11; emphasis by petitioner). There was absolutely no evidence that Clark-Schwebel ever received any such complaints and, as noted, petitioner relied on a theory of personal animosity as supplying Clark-Schwebel's "motivation" to destroy Textura. The petition is replete with other misstatements and distortions of the record (some of which are discussed in the Argument below). We note at this point that Mr. John Wilson is said to be a principal "conspiring actor" as Vice President of Burlington (Pet. 12). In fact, Mr. Wilson was employed by J. P. Stevens which was exonerated by the jury. Similarly, Mr. Ray Clark is said to be another principal "conspiring actor;" yet Mr. Clark died two years before the conspiracy allegedly began. Tr. 235.

[5] Undisputed facts established that throughout Textura's 12-year history it was a "financially thin" company and never had sufficient cash with which to operate. For example, Textura's working capital was chronically negative (minus $98,650 in 1964 and minus $50,000 in 1965). *See* PX 20, PX 36. Textura suffered combined losses of about $125,000 in the years 1964 and 1965 alone (DX B). Its gross sales never exceeded $1.5 million annually (*id.*). One can scarcely credit petitioner's present assertion that Textura in 1966 was "robust," "burgeoning," and faced "rosy financial prospects" (Pet. 10).

The case proceeded to trial before Judge Tenney and a jury on October 15, 1974. Upon conclusion of plaintiff's case in chief, defendants jointly moved for a directed verdict on the ground that plaintiff's circumstantial evidence gave rise to no inference of conspiracy. Decision was reserved on this motion.

On November 18, 1974, the jury returned a verdict against Burlington and Clark-Schwebel finding a conspiracy to drive Textura out of business (Tr. 2447-48). Defendant Stevens was exonerated. Single damages were assessed in the amount of $531,617.00, which were trebled by judgment entered on November 22, 1974.

In a "Memorandum Order" dated May 2, 1975, the District Court, without citation to a single case, denied defendants' renewed motions for a directed verdict and for judgment notwithstanding the verdict or in the alternative for a new trial.[6]

On April 21, 1976, the Court of Apeals for the Second Circuit in a 27-page opinion unanimously reversed

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[6] At page 19 of the petition, Textura implies by its citation to the "Memorandum Order" (*e.g.*, "App. B, pp. 2ff") that the trial court discussed the evidence allegedly supporting the verdict in detail. In fact, only two paragraphs of the "Memorandum Order" referred to the evidence and this reference was in the most conclusory, unanalytical terms (*see* Pet. App. B, p. 2). Moreover, the district court erroneously concluded that efforts by Burlington to assure payment by Textura of its outstanding indebtedness, including a request that the accounts be personally guaranteed by Mr. Powrie, were contrary to Burlington's self-interest and thus constituted circumstantial evidence of conspiracy (*id.* at p. 2).

the judgment of the district court on the ground that the evidence—viewed in the light most favorable to Textura and affording the prevailing party all reasonable inferences—was insufficient to support the verdict, and indeed, that the verdict was totally contradicted by undisputed facts. Fully and carefully considering all the facts advanced by petitioner in support of the verdict, including those set out in the present petition, the Court of Appeals concluded that each respondent had acted independently and consistently with its own business interest in its dealings with Textura.

As detailed by the Court of Appeals and set out more fully in the Argument below, the facts showed, among other things, that during the very heart of the alleged conspiracy (March 1, 1966 until December, 1966): 1) Burlington continued to extend credit to petitioner and to ship fabrics in record amounts while Clark-Schwebel terminated credit and refused to ship fabrics except for cash; 2) Burlington accepted new styles for weaving for Textura, including at least one fabric formerly woven by Clark-Schwebel but which the latter refused to weave pending resolution of its arbitration dispute with Textura; 3) Burlington always made satisfactory adjustments on Textura's quality claims, while Clark-Schwebel never did; 4) Burlington extended credit to Textura running into 1967 and accepted new contracts for that year notwithstanding Mr. Powrie's failure in 1966 to renew a personal guarantee he had given to Burlington in 1965; and 5) Burlington, unlike Clark-Schwebel, never withdrew Textura's warehousing privileges but continued to weave and store fabrics for Textura at Burlington's own expense until called out by petitioner.

The Court of Appeals held that respondents' sales and credit actions were thus not similar or parallel in substance or timing and, even if this fact were otherwise, no inference of conspiracy would be permissible since the actions at issue were consistent with individual business self-interest and reasonably could have been expected in the absence of any conspiracy. With specific reference to Burlington, the Court held that the record showed beyond question that this defendant "sought through leniency to capture some of the business being given up by [Clark-Schwebel]" (Pet. App. A, p. 3355).

Noting that the evidence provided no basis for a finding of conspiracy, the Court of Appeals concluded (Pet. App. A, pp. 3345-3346):

> . . . The record, on the contrary, reveals at most independent efforts by each of the three suppliers lawfully to continue doing business with a customer which was in a financially precarious condition on terms that would protect the supplier from ending up unable to obtain payment for goods supplied. Each pursued a substantially dissimilar and divergent course from the others in its efforts to achieve this objective; each was, however, ultimately unsuccessful in obtaining payment of all of Textura's indebtedness to it.[7]

Textura's petition for rehearing, based on factual arguments similar to those advanced in the present petition, was denied on May 12, 1976.

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[7] At the time of its assignment for the benefit of creditors in December of 1966, Textura owed Burlington approximately $20,000 (PX 806).

ARGUMENT

Introduction and Summary

The Court of Appeals, after a thorough and fair review of the facts relied upon by petitioner in support of its theory of conspiracy, held that the verdict was not only unsupported by the evidence but was contrary to the undisputed facts. In concluding that the "evidentiary picture is not even dimly one of conspiracy" (Pet. App. A, p. 3345), the Court of Appeals applied the settled principle, often affirmed by this Court, that lower courts not only have the power but the duty to set aside a verdict that is not sustained by the evidence.

While devoting no fewer than 18 of the 28 pages of the petition to a discussion of the facts allegedly misperceived by the court below, petitioner concedes, contradictorily (but correctly), that "mere misconstruction of the evidence would not justify certiorari" (Pet. at 24). Yet plaintiff does not contend that the court below improperly interpreted or applied substantive antitrust law or that it committed any error other than in its conclusion that the verdict was totally lacking in evidentiary support and therefore should be set aside.

Petitioner suggests that this Court, in the exercise of its supervisory responsibility, should withdraw the power and duty of reviewing courts to set aside unsupported verdicts in cases where the trial judge, in denying post-trial motions, "agrees" with the verdict. Premised on the notion that two wrongs make a right, the proposed rule would forbid reviewing courts from upsetting palpably wrong verdicts so long as the trial judge concurred in the error. Lacking merit on its face, this proposal to abrogate appellate review in large numbers of cases is nothing more than an effort to screen the inescapable fact that this case raises routine factual questions of interest only to the immediate parties involved, and which were in any event correctly decided by the Court of Appeals. No question of law, procedure or policy warranting plenary consideration by this Court is presented and the petition should be denied.

I.

THE COURT OF APPEALS FULLY CONFRONTED PETITIONER'S THEORY AND EVIDENCE AND CORRECTLY CONCLUDED THAT THE VERDICT WAS TOTALLY WITHOUT SUPPORT

Petitioner contends that the Court of Appeals failed to "confront" Textura's theory of conspiracy and failed to consider the evidence supporting that theory. Neither contention has merit.

The Court of Appeals specifically noted (Pet. App. A, pp. 3335, 3345, 3353) that petitioner's theory of conspiracy was to the effect that respondents Burlington and Clark-Schwebel (along with Stevens) pursued parallel courses of action in (1) restricting credit, (2) delivering defective fabrics, (3) withholding deliveries of fabrics, (4) refusing to weave fabrics, and (5) forcing Textura to settle its dispute with Clark-Schwebel on unfavorable terms, all of which actions were alleged to have been contrary to the independent self-interests of respondents. In addition, as noted by the Court of Appeals (Pet. App. A, 3355-3359), Textura alleged that a motive existed for respondents to act as they did, as reflected in certain purported "admissions" made by Burlington personnel, and that the conspiracy

was effectuated by means of a series of telephone calls between credit men at Burlington, Clark-Schwebel, and Stevens in which the status of Textura's credit, including its dispute with Clark-Schwebel, was discussed.[8] The Court's understanding of petitioner's theory thus comports precisely with Textura's own statement of its contentions in the present petition (*e.g.*, Pet., p. 17).

The Court of Appeals specifically reviewed all of Textura's contentions and the evidence offered in their support, mindful of its duty to view the evidence in the light most favorable to plaintiff and to give plaintiff the benefit of all inferences fairly supported by the evidence. Nonetheless, as noted by the Court (Pet. App. A, p. 3344):

> If, however, after viewing all the evidence most favorably to plaintiff, we cannot say that the jury could reasonably have returned the verdict in

[8] The Court reviewed these credit communications in detail (Pet. App. A, pp. 3355-58). Only members of Burlington's Credit Department were involved in these credit exchanges and there was no evidence that personnel of Burlington's sales department ever communicated with any other defendant about Textura. The Court of Appeals correctly held that the exchange of credit information, unlike the exchange of pricing data, raises no question under the antitrust laws "provided that any action taken in reliance upon [such credit information] is the result of each firm's independent judgment, and not of agreement" (*id.*, p. 3357). The Court held that the undisputed facts concerning the content of the communications in the present case, and the actions of the parties, "do not support any inference that Clark-Schwebel and Burlington stepped beyond these permissible boundaries" (*id.*). As we show below, Burlington's credit and sales actions, as the Court found, were the result of independent business judgment and were formulated *before* the first of these allegedly conspiratorial communications occurred. *See* pp. 11-16, *infra*.

> [plaintiff's] favor, our duty is to reverse the judgment below. The jury's role as the finder of fact does not entitle it to return a verdict based only on confusion, speculation or prejudice; its verdict must be reasonably based on evidence presented at trial.

Citing *Continental Oil Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962)—the case primarily relied upon by petitioner here—the Court of Appeals also recognized its duty to view the alleged evidence of conspiracy as a whole, rather than dismembering it and considering its parts in isolation (Pet. App. A, p. 3344). Reviewing the evidence in accordance with this principle, the Court concluded: "But even when the evidence is viewed as a whole, the picture is not even dimly one of conspiracy" (App. A, p. 3359).[9] This conclusion was plainly correct and it presents no issue meriting review by this Court.

A. The Alleged Restrictions of Textura's Credit

The Court of Appeals held that the credit policies of Burlington and Clark-Schwebel toward Textura, the principal basis of Textura's complaint, could not support an inference of conspiracy (Pet. App. A, p. 3353). As the Court found (*id.*), "[n]ot only did the credit policies of each supplier differ substantially but there is no evidence indicating that they were mutually for-

[9] Based on this conclusion, the Court found it unnecessary to rule upon respondents' additional contentions that neither the fact nor amount of damages had been proven by reliable evidence and that numerous procedural errors in the conduct of the trial (including a portion of the charge admitted by the trial judge to be wrong (Tr. 2382-83)) required a new trial. *See* Pet. App. A, pp. 3359-60.

mulated or invoked."[10] With specific reference to Burlington's credit actions in 1966—relied upon heavily by Textura as proof of this respondent's participation in a conspiracy—the Court concluded that "the evidence shows that these actions were the result of Burlington's independent judgment and not the product of any conspiracy with Clark-Schwebel" (*id.*).

The record permits no other conclusion. The evidence clearly demonstrated that Burlington independently formulated its credit policy toward Textura long before the alleged commencement of the conspiracy (March, 1966). Thus, as the Court noted (Pet. App. A, pp. 3339-40), on April 2, 1965, a year before the conspiracy began, Burlington decided to require Powrie's personal guarantee for 1965 because of the "staggering" losses incurred by Textura in 1964. *See* DX BB. Similarly, as the Court also pointed out (Pet. App. A, pp. 3341-42), Burlington on the same date decided to require payment from Textura within 90 days from the date of invoice and obtained Textura's promise to work toward eventual prompt payment (*i.e.*, 60 days). *See* DX BB. On December 30, 1965, Burlington decided to hold up shipments if Tex-

[10] It cannot be disputed that the acts and practices of Burlington and Clark-Schwebel were substantially dissimilar, with Clark-Schwebel putting Textura on cash terms and billing it for all goods being held but with Burlington continuing to offer credit and to warehouse Textura's goods at no cost to petitioner. These and similar facts led the Court to conclude (Pet. App. A, p. 3355):

> Far from indicating any conspiracy to pursue common credit policies designed to drive Textura out of business, the picture is just the opposite, with one creditor (Clark-Schwebel) adopting a Procrustean policy, while the other (Burlington) sought through leniency to capture some of the business being given up by the first.

tura did not pay its bills within 60 days of the date of invoice as promised (*see* PX 91) and on January 5, 1966 (at least two months before the conspiracy allegedly began) Burlington independently decided to seek a renewal of Powrie's personal guarantee for 1966 (Pet. App. A, p. 3342).

Furthermore, as the Court noted (Pet. App. A, p. 3350), while the conspiracy allegedly began on March 1, 1966 when Clark-Schwebel placed Textura on a cash basis, Burlington did not even learn of this action until June 8, 1966. Prior to learning of this action, Burlington independently continued its efforts to obtain Powrie's personal guarantee in light of Textura's "horrible" financial results in 1965 (DX BE; BF; BH; BK; PX 60).[11] When those efforts were unsuccessful, Burlington in April and May of 1966 (again, before learning of Clark-Schwebel's actions) independently delayed approval of new orders placed by Textura (Pet. App. A, pp. 3349-50). *See also* DX AO, DX BL, DX BM.[12]

[11] Despite petitioner's present belated attempt to characterize the loss of over $113,000 in 1964 as "a planned loss," and the further loss of about $30,000 in 1965 as the result of "consolidation" (Petition, p. 10), by Powrie's own admission the financial losses in these two years were "staggering" and "horrible," respectively. It strains credulity for petitioner to suggest that these losses actually demonstrated "rosy financial prospects" for Textura (Petition, p. 10).

[12] The Court below noted that Textura relied heavily—as it does now—on the delay in approval of these new orders as an inference of conspiracy, but the Court held that Burlington's lack of knowledge of Clark-Schwebel's action, as well as "later events [including approval of these very orders] negates it" (Pet. App., pp. 3349-50).

After Burlington learned on June 8, 1966, that Clark-Schwebel had placed Textura on a cash basis and was contemplating an arbitration proceeding—which Textura has always admitted would be a matter of natural and legitimate concern to its creditors (Tr. 663-65, 1072-73, 1109-11)—Burlington nevertheless continued to extend credit to Textura, although it insisted that Textura try to keep its prior promise of April, 1965, of making payment within 60 days of the date of invoice (DX BO, BP, BS). In August, 1966, Burlington's credit department approved all new orders placed by Textura (PX 548), and decided to continue extending an open line of credit to petitioner for the rest of the year, provided Textura complied with Burlington's year-old policy of payment within 60 days of the date of invoice (PX 548). In November 1966, Burlington decided to extend credit approval on new orders running into 1967 (DX BS).

On the basis of this undisputed evidence, the Court of Appeals correctly concluded that the credit actions taken by Burlington were the result of a policy independently formulated by Burlington in 1965, one year prior to the start of the alleged conspiracy (Pet. App. A, p. 3353), and were the result of Burlington's own independent judgment, not the product of any conspiracy with Clark-Schwebel. Moreover, the Court recognized—and Textura has never been able to refute the fact—that Burlington's actions were entirely consistent with its independent self-interest, since Textura suffered "horrible" financial results in 1965 and in mid-1966 was faced with a sizable arbitration proceeding with Clark-Schwebel, which, as the Court said, very well "could be the final blow collapsing Textura's admittedly thin financial structure" (Pet. App. A, pp.

3353-54). The Court of Appeals stated (Pet. App. A, p. 3354):

> The only conclusion that can be drawn is that it was reasonable for Burlington, in its own self-interest as a creditor, to worry about the arbitration, and to ask for a guarantee as a step to protect itself against Textura's possible bankruptcy. [citation omitted.] Even assuming that the Burlington request for a guarantee could be considered parallel with Clark-Schwebel's earlier cut-off of credit that step, being in Burlington's individual economic interest, could not without more, raise an inference of conspiracy [citations omitted].

The Court held that the other evidence relied upon by petitioner could not alter this conclusion.

B. The Alleged Refusals to Deliver Fabrics

The Court of Appeals explicitly "confronted" Textura's claim that respondents withheld or delayed the delivery of fabrics to Textura as part of the alleged conspiracy (Pet. App., pp. 3335, 3346-51). It concluded, however, that undisputed facts on this issue rebutted petitioner's claimed inference and, indeed, directly contradicted the existence of any conspiracy (Pet. App. 3351).

Thus, as noted by the Court, during the heart of the "conspiracy" period when Burlington allegedly was trying to force Textura to settle its arbitration dispute with Clark-Schwebel, it was shipping goods to Textura in *record* quantities (Pet. App. A, pp. 3348-49). Only in August, 1966, *after* the arbitration between Clark-Schwebel and Textura was settled, did Burlington's shipments to Textura decline, and this decline, the

Court held (Pet. App. A, p. 3350), was the result of credit actions independently taken by Burlington in April and May 1966, *prior* to learning of Textura's dispute with Clark-Schwebel, when Powrie was "stalling" on renewing his personal guarantee to Burlington.[13] *See also* DX BH, BK, BL, BM; PX 60, 123. Moreover, even these temporarily delayed contracts were subsequently approved by Burlington's *credit* department in August, 1966, and, indeed, many of the fabrics were already in inventory by that date (PX 548) since the sales department had started weaving them at its own risk without credit approval (DX BN). *See* Pet. App. A, pp. 3350 and n.10.

As the Court of Appeals noted, there was a "radical difference between Clark-Schwebel's and Burlington's treatment of Textura during the alleged conspiracy" (Pet. App. A, pp. 3346-47) with regard to the shipment of fabrics to Textura. While Clark-Schwebel "drastically cut its sales to Textura as a result of its dispute with that company" (Pet. App. A, p. 3347), Burlington's shipments to Textura "increased substantially" over the previous year's figures (Pet. App. A, p. 3348).[14]

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[13] The Court thus completely answered petitioner's present contention (Pet. 21-22) that the lack of shipments in August and September was the result of conspiracy and were planned to coincide with Clark-Schwebel's March, 1966 actions.

[14] As the Court observed (Pet. App. A, pp. 3347-48):

> Had Burlington and Clark-Schwebel been conspiring to coerce Textura into accepting Clark-Schwebel's demands, one would expect Burlington's shipments to be reduced similarly, thereby increasing the pressure on Textura to settle its dispute with Clark-Schwebel on terms unfavorable to Textura. However, on the contrary, Burlington's shipments to Textura increased substantially during this period over comparable 1965 figures.

Based on petitioner's own evidence reflecting fabric shipments to Textura by Burlington, the Court was unequivocal in its conclusion (Pet. App. A, p. 3351):

> In sum, the record of the 1966 shipments by Burlington and Clark-Schwebel to Textura not only fails to support the claim of conspiracy but points in the opposite direction. The two companies followed wholly different policies in their sales of fabrics to Textura. Burlington had developed its policy long prior to the period of the alleged conspiracy and did nothing to change it in response to Clark-Schwebel's switch to a harder line. Indeed, Burlington's large shipments in the spring and summer would tend to undercut Clark-Schwebel's position.

C. The Alleged Refusals to Weave New Fabrics

Contrary to petitioner's present contentions, the Court of Appeals clearly understood that Textura was claiming a refusal to weave new fabrics as evidence of Burlington's participation in a conspiracy. It held, however, that the evidence not only did not support the contention that Burlington conspiratorially refused to weave new fabrics but that Burlington's action in this regard "was the antithesis of conspiratorial conduct" (Pet. App. A, p. 3351).

The Court referred to the facts that on May 11, 1966, during the middle of the alleged conspiracy, Textura placed an order with Burlington for a fabric style ("Homespun") formerly woven exclusively for Textura by Clark-Schwebel and that Burlington in fact wove 25,000 yards of the fabric (*id.*). Petitioner carefully avoids any reference to this transaction, so anti-

thetical to the existence of an agreement between respondents to refuse to weave new fabrics.[15]

Also contradicting any claim of conspiracy, as the Court of Appeals held, was Burlington's entire course of conduct respecting the acceptance of new orders. *See* Pet. App. A, p. 3350. After Burlington removed the independently established credit "hold" on certain orders while Powrie "stalled" on renewing the guarantee, Burlington reviewed Textura's fabric requirements with Powrie and proceeded to weave all the fabrics requested (Pet. App. A, pp. 3350-51). In fact, by November 1966, Burlington had in inventory 71,500 yards of fabric specially woven for Textura, and was in the process of weaving 11,000 additional yards (DX BS). When Textura went out of business, Burlington had in inventory about 85,000 yards of fabric specially woven for Textura (PX 884).[16]

As the Court of Appeals concluded, all of this evidence, since it showed that Burlington *did* accept and weave new fabrics during the heart of the alleged conspiracy, totally refutes Textura's claim that Burlington conspiratorially refused to accept new orders for Textura.

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[15] Burlington also wove a sample of another Textura fabric ("Morro") formerly woven exclusively by Clark-Schwebel but, as the Court of Appeals pointed out, "Mr. Powrie testified that 'Morro kind of faded out of the picture' (Tr. 375), which is the only conclusion the evidence supports on the fate of this order" (Pet. App. A, p. 3351, n.11).

[16] Petitioner now implies that Burlington was weaving these fabrics for another alleged co-conspirator, Soft-Flex Fabrics, Inc., (Pet. 16), which, according to petitioner's speculation, was to take over when Textura was destroyed. The trial court ruled, however, that there was no evidence whatever showing that Soft-Flex or its principals were involved in any way in any conspiracy with defendants (Tr. 1883).

D. The Alleged Deliveries of Defective Merchandise

The Court of Appeals also "confronted," and rejected, Textura's claim that Burlington delivered defective fabrics to Textura as part of the conspiracy. As the Court concluded (Pet. App. A, p. 3352), it is undisputed that in each and every instance in which Textura complained of quality problems Burlington made an adjustment which was fully satisfactory to Textura. Thus, said the Court (*id.*):

> Burlington's . . . attitude on quality complaints by Textura again stands in sharp contrast to Clark-Schwebel's position. While Clark-Schwebel's refusal to make what Textura deemed adequate adjustments of its quality complaints was a major factor precipitating the dispute between those two companies, Powrie testified that Burlington had been consistently more reasonable in making adjustments for defective fabrics. . . . [B]y Powrie's own testimony, Burlington offered him satisfactory quality adjustments on various fabrics as late as December of 1966.

With respect to Textura's theory that as part of the "conspiracy" Burlington deliberately wove a former Clark-Schwebel fabric ("Homespun") in a defective manner, the Court of Appeals held (Pet. App. A, pp. 3351-52):

> While we must give the plaintiff the benefit of every reasonable inference, this argument leaps from inference into unbounded speculation, particularly in view of the fact that, when the quality problem with "Homespun" became evident, Burlington did not attempt to force the inferior fabric on Textura or otherwise use the contract as a tool to harass that company. Rather, it agreed to void the contract or, alternatively, to sell the fabric to Textura at a closeout price. . . . The only reason-

able inference which can be drawn from this episode is that Burlington was not conspiring with Clark-Schwebel. . . .

In sum, all of the actions relied upon as similar or parallel and supporting inferences of conspiracy were in fact not similar at all and can provide no support for the verdict. The Court below concluded (Pet. App. A, pp. 3345-46) (emphasis added):

> The dissimilarity between the conduct of the two defendants in their dealings with Textura extended to such basic matters as their willingness to ship goods on credit to Textura, the credit policy terms of each toward Textura, and the adjustment of quality claims. The evidence with respect to these matters not only fails to provide any basis for a finding of conspiracy, *it reveals conduct that is diametrically opposed to and inconsistent with any such combination or agreement....* Given this failure to show evidence probative of a conspiracy, the verdict cannot stand.

Finally, as we next show, this conclusion cannot be overturned by petitioner's speculations concerning respondents' alleged motives for driving Textura out of business.

E. The Purported Motive for the Conspiracy

The Court of Appeals stated that "[w]e have carefully reviewed the other evidence [including alleged motive] advanced at trial in support of the conspiracy claim, and find it cannot fairly be viewed as raising an inference of conspiracy" (Pet. App. A, p. 3358). The Court ruled that no significance could be attached either to an isolated statement by a Burlington employee *two years before the conspiracy* that he would rather not do business with Textura or to a series of "complaints"

received by Burlington over the years from other fabric customers concerning the way Textura did business. Any possible inference in these isolated preconspiracy matters, the Court held, was fully rebutted by the fact that Burlington *did* continue to do business with Textura up until the time of petitioner's bankruptcy[17] (Pet. App. A, p. 3358).

Similarly, while the alleged "complaints" were of long standing, it is undisputed that Burlington never took any action against Textura.[18] As the Court of Appeals held (Pet. App. A, p. 3359):

> . . . Burlington had continued to deal with Textura for years. The suggestion that [the complaints] suddenly provided a motive for Burlington to destroy Textura in 1966 thus ranks as utter specu-

[17] With respect to the so-called "complaints," we note (as did the Court of Appeals) that Textura offered proof that its business was unique and that it had displaced not other fabric merchants but venetian blind dealers. *See* Pet. App. A, p. 3358, n.17.

[18] Petitioner persists in flatly misrepresenting that Mr. Vollers of Burlington's sales department testified that his superior told him to "do something about Textura" (Pet. 12). This is a direct quotation, *not from the testimony of the witness,* but from the closing argument of Textura's counsel (Tr. 2265). In fact, Mr. Vollers said no such thing. *See* Tr. 1826-30.

Also inaccurate are petitioner's representations concerning the termination of Textura's factoring agreement by its factor, L. F. Dommerich & Co. (Petition, pp. 15-16). There is no evidence of record as to why Dommerich cancelled its agreement with Textura, although, as the Court of Appeals noted, respondents would have introduced evidence to demonstrate an *independent* termination by Dommerich had the trial court not ruled the Dommerich question out of the case (Pet. App. A, p. 3343). See Tr. 1744-45, 1808-09. As the trial judge observed, there was no proof that Dommerich was involved in any conspiracy, and as the Court of Appeals said, "there is no evidence that the [respondents] were involved in [Dommerich's] decision [to terminate]" (Pet. App. A, p. 3343).

> lation . . . especially since Burlington made no effort to coerce Textura into stopping the marketing methods which allegedly gave rise to the complaints.

We submit that these and the other rulings of the Court of Appeals are correct in every respect. The proof shows that at all times Burlington acted independently in the exercise of its own business judgment and made no agreement with anyone concerning whether or in what amount or on what terms it would do business with Textura. The factual issues raised by petitioner are of the type that this Court regularly has refused to consider.[19]

II.

THE COURT OF APPEALS ACTED WITHIN ITS CONSTITUTIONAL AND STATUTORY AUTHORITY IN SETTING ASIDE THE UNSUPPORTED VERDICT

We have demonstrated above that this case involves merely factual issues of interest only to the parties involved. In a transparent attempt to disguise this fact and to capture the attention of this Court, petitioner

[19] *See, e.g.*, Hallmark Industry v. Reynolds Metals Co., 489 F.2d 8 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974) (affirming judgment n.o.v. for defendants); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) (reversing judgment on jury verdict and directing entry of judgment n.o.v. for defendants); Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963) (affirming directed verdict for defendants); Clark v. United Bank of Denver, N.A., 480 F.2d 235 (10th Cir.), *cert. denied*, 414 U.S. 1004 (1973) (affirming summary judgment for defendants); Delaware Valley Marine Supply Co. v. American Tobacco Co., 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962) (affirming directed verdict for defendants). *See also* Modern Home Institute, Inc. v. Hartford Accident & Indem. Co., 513 F.2d 102 (2d Cir. 1975).

urges that the Constitution is transgressed when a Court of Appeals upsets a jury verdict in which the trial judge in ruling on post-trial motions has specifically concurred. Petitioner asks this Court to adopt the following rule of law: "When a jury verdict is explicitly concurred in and approved by the trial judge, it will not be reversed on appeal on the sole ground that the facts do not sustain the verdict" (Petition, p. 26).[20]

In the first place, the principle espoused by petitioner is not even raised by the present case and adoption of the proposed rule would be pure dictum because the verdict was *not* set aside solely on the ground that it was not sustained by the evidence. To the contrary, as the Court of Appeals made clear (Pet. App. A, p. 3346) (emphasis added): "The evidence . . . not only fails to provide any basis for a finding of conspiracy, *it reveals conduct that is diametrically opposed to and inconsistent with any such combination or agreement.*" Thus, the verdict was flatly contrary to the undisputed evidence, not merely unsupported by petitioner's proof.

[20] Petitioner repeatedly asserts that in the instant case the jury's verdict was "wholly, explicitly and strongly approved" by the trial judge (*e.g.*, Petition, pp. 2, 3, 4, 24). Petitioner overlooks the facts, however, that (1) the jury's verdict was returned only after obvious confusion during more than four days of deliberation, in which it made numerous requests for clarification and guidance; (2) the trial judge, due to a personal emergency, was not available to answer the jury's questions and a substitute judge purported to provide the requested guidance (see Tr. 2392-2447); and (3) the trial judge did not "wholly, explicitly and strongly" approve the jury's verdict, but rather dealt cursorily with the verdict in only two paragraphs of a "Memorandum Order" (Pet. App. B, p. 2), failed to discuss any of the evidence of record, and did not cite a single case in support of the decision.

Moreover, the proposed rule is simply wrong on its face since it would have the effect of denying appellate review in all cases where the trial judge compounds the error of an unsupported verdict by agreeing with it.

Where, as here, a trial judge errs in denying motions for a directed verdict or for judgment notwithstanding the verdict, the Court of Appeals is empowered—indeed, is obligated—to reverse the error of the trial court. In such instances, it is well-established, the Seventh Amendment poses no obstacle to reversal on appeal. As this Court held in *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 322 (1967):

> As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v.* *See Baltimore & Carolina Line, Inc.* v. *Redman* [295 U.S. 654 (1935)]. Likewise, the statutory grant of appellate jurisdiction to the Courts of Appeals is certainly broad enough to include the power to direct entry of judgment *n.o.v.* on appeal. [Citing 28 U.S.C. §2106.]

See also, Montgomery Ward & Co. v. *Duncan,* 311 U.S. 243, 254 (1940); *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654 (1935); 5 Moore's Federal Practice ¶ 38.05(5), at 89-90 (1976).

Petitioner requests nothing less than total abrogation of the right to appellate review in cases like the present one; it vaguely promises in return nothing more than an unclogging of some appellate calendars. See Petition, p. 26. Petitioner raises a specious issue for which not a single precedent is cited. The Court

should reject this obvious attempt to impart substance where none exists.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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